

ORIGINAL

95-1726

Supreme Court, U.S.

FILED

MAY 22 1996

CLERK

IN THE SUPREME COURT OF THE UNITED STATES  
October Term, 1995

UNITED STATES OF AMERICA

Petitioner

v.

ALFRED L. HUNNEWELL

Respondent

MOTION OF RESPONDENT ALFRED L. HUNNEWELL  
PURSUANT TO RULE 39 TO PROCEED *IN FORMA PAUPERIS*

Respondent, ALFRED L. HUNNEWELL, by and through his attorney of record, MICHAEL C. BOURBEAU, who was previously appointed by the United States Court of Appeals for the First Circuit pursuant to the Criminal Justice Act, 18 U.S.C. § 3506A, hereby moves this Honorable Court pursuant to Rule 39 of the Rules of the Supreme Court to allow him to proceed *in forma pauperis* with the filing of the Brief in Opposition to the Petition for Writ of Certiorari filed herewith, and further for the appointment of MICHAEL C. BOURBEAU as counsel for Respondent pursuant to Rule 39((7)).

Date: May 22, 1996

Respectfully submitted,



MICHAEL C. BOURBEAU  
50 Beacon Street, 4th Fl.  
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(617) 367-9695  
Attorney for Respondent  
ALFRED L. HUNNEWELL

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95-1726

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T. David Raftery, Esq., Of Counsel

May 22, 1996

Clerk's Office  
United States Supreme Court  
1 First Street N.E.  
Washington, DC 20543

RE: U.S. v. Hunnewell (Labonte, et. al)  
Case No.

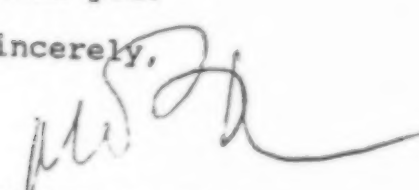
Dear Clerk:

Enclosed for filing in the above case, please  
find an original and 10 copies of Respondents  
Opposition Brief along with an original and 3  
copies of a motion for leave to proceed *in*  
*forma pauperis*.

Please contact me if there are any questions  
with the enclosed.

Thank you.

Sincerely,

  
MICHAEL C. BOURBEAU

ORIGINAL

95-1726



No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

UNITED STATES OF AMERICA,  
Petitioner,

v.

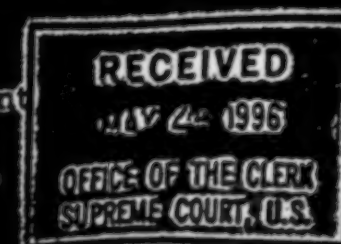
ALFRED L. HUNNEWELL  
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT ALFRED L. HUNNEWELL'S OPPOSITION BRIEF TO PETITION

Michael C. Bourbeau, Esq.  
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Attorney for Respondent  
ALFRED L. HUNNEWELL



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#### QUESTION PRESENTED

Whether the United State's Sentencing Commission's overall implementation of the statutory directive in 994(h), through the career offender guideline in 4B1.1 as amended, is reasonably consistent with the language and purpose of the instruction in 994(h) which requires a sentence "to a term of imprisonment at or near the maximum term authorized?"

#### OPINION BELOW

As stated by Petitioner the opinion of the Court of Appeals is reported at 70 F.3d 1396 and is contained in Petitioner's Appendix at 1a-53a.

#### JURISDICTION

Jurisdiction of this Honorable Court is allowed pursuant to 28 U.S.C. § 1254(i).

#### STATUTORY PROVISION INVOLVED

Petitioner has correctly set forth the statutory provision and U.S. Sentencing Guideline Commentary that is involved in this case.

#### STATEMENT OF THE CASE

Respondent ALFRED L. HUNNEWELL respectfully opposes the Petition for Writ of Certiorari on the ground that the Guideline Commentary in issue provides the trial court with needed

discretion to issue an appropriate sentence of at least 151 months (almost 13 years) within a broad guideline range, App. at 9a,fn. 4, which sentence would be fair and comparable to similarly situated defendants.

Specifically this case focuses on the severe consequences of subsequent convictions on relatively small street offenses for distribution of small amounts of contraband and the extent to which the Government will expend its resources to ensure that defendants receive the maximum possible sentence. Mr HUNNEWELL was charged and plead guilty to two counts of distribution of a small amount of cocaine and a small amount of marijuana in violation of 21 U.S.C. §§ 801, et. seq. *Id.* Although the potential guideline sentence for the charged offenses alone, in the absence of further enhancements, based on a marijuana equivalency factor of 138.6 grams, would have mandated a sentence of Offense level 11, Category VI, for a total sentence of 27-33 months, (See HUNNEWELL's Opening Brief at 2-3) Mr. HUNNEWELL was determined to be a career offender under U.S.S.G. § 4B1.1 and thus subject to the harsh penalties of said provisions. HUNNEWELL was also subject to the enhanced maximum penalties of 21 U.S.C. § 841 (b)(1)(c) based on two prior state convictions for drugs (See Petition at 5, fn.1). His resulting sentence was: Offense level 31 (34 minus 3 for acceptance of responsibility) for a total of 188 months. App at 9a.



In November, 1994 the United States Sentencing Commission enacted Amendment 506 to U.S.S.G. § 4B1.1 which re-defined "statutory maximum" for purposes of the application of that guideline provision as the "statutory maximum" for the current offense exclusive of past convictions. Application of the Amendment to the instant case would potentially reduce Appellant's sentence because Appellant's new base level would be 32 and once adjusted for acceptance of responsibility, level 29 with a resulting sentencing range of 151-188 months, *Id.* This case concerns solely the Government's objection with this Amendment which potentially would only incrementally decrease the sentence of Mr. HUNNEWELL and similarly situated defendants.

#### REASONS FOR DENYING PETITION

This Honorable Court has already made clear that United States Sentencing Guideline Commentary that "interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or plainly erroneous reading of that guideline," *Stinson v. United States*, 508 U.S. 36, \_\_\_, 113 S.Ct. 1913, 1915, 123 L.Ed.2d 598 (1993) (emphasis added). While the Petition correctly identifies the conflict among the United States Circuit Courts on the issue of whether the Amendment in issue is violative of federal statutes, Petition at 14-17, the issue concerns only a minor

incremental change in the Guidelines that is both not an important question of law, nor appear to effect many cases. As Petitioner acknowledges, this Amendment only effects those limited cases where both the defendant is determined to be a Career Offender and when the Government chooses to exercise its discretion to allege prior drug convictions under 21 U.S.C. § 851 (a) (1), See Petition at 20.

One need only examine the Guidelines Policy Statement and Guideline Commentary to other provisions to realize that in order to create uniformity in sentencing, the guidelines "will not please those who wish the Commission to adopt a single philosophical theory --- to establish a simple and perfect set of characterizations and distinctions....[the guidelines are developed] as a practical effort toward the achievement of a more honest, uniform, equitable, proportional, and therefore more effective system." U.S.S.G. Introduction, the Basic Approach. Sentencing adjustments to the prosecutorial charging decision are minor limitations on discretion that are necessary to carry out these sentencing goals. For example, the Introductory Commentary to U.S.S.G. § 3D, sentencing on multiple counts, specifically indicates that the "grouping" of offenses is done "[i]n order to limit the significance of the charging decision and to prevent multiple punishment for substantially identical offense conduct." Amendment 506 is simply a similar limitation.

The Guidelines and the Career Criminal Provisions therein, as written, already require extremely harsh sentences, See *Opinion of the Court of Appeals*, App. 6a,fn.1. In the absence of said provisions Mr. HUNNEWELL would only be subject to a sentence of 27-33 months. In view of other methodology for courts to adjust guideline sentences through departure in appropriate cases, see e.g. U.S.S.G. 4A1.3, (under and over representation of criminal history) and U.S.S.G. § 3D1.4 Background Commentary ("Situations in which there will be inadequate scope for ensuring appropriate additional [or excessive] punishment--- can be handled through departure"), the incremental adjustment to a defendant's total punishment does not appear to merit this Honorable Court's consideration.

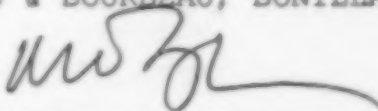
#### CONCLUSION

The Petition for Writ of Certiorari should be denied.

Date: May 22, 1996

Respectfully submitted,

BOURBEAU & BOURBEAU, BONILLA & TOCCHIO



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